STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98B097

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT WORKMAN,

Complainant,

VS.

DEPARTMENT OF CORRECTIONS,

Respondent.

THIS MATTER came on for hearing on August 10 and September 22, 1998 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Thomas S. Parchman, Assistant Attorney General. Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

Respondent called two witnesses: Gene Atherton, Warden, Buena Vista Correctional Facility and Clyde Stahl, Case Manager III, Delta Correctional Facility. Complainant testified in his own behalf.

Respondent's Exhibits 1 through 13 were stipulated into evidence, as were Complainant's Exhibits B through E. Exhibit A was excluded from evidence.

MATTER APPEALED

Complainant appeals his disciplinary demotion under Board Rule 8-2-5(A). For the reasons set forth herein, respondent's action is affirmed.

ISSUES

- 1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
- 2. Whether the discipline imposed was within the range of available alternatives;
- 3. Whether just cause exists for the discipline imposed;
- 4. Whether either party is entitled to an award of attorney fees.

PRELIMINARY MATTERS

At respondent's request, notice was taken of the State Personnel Board's case file. Respondent's request for administrative notice of the facts as found in Workman v. Department of Corrections, Case No. 96B026(C), was denied. Respondent renewed its motion for summary judgment, which was first denied on May 6, 1998, on grounds that there were no genuine issues of material fact because complainant's admissions of certain corrective actions and needs improvement PACE ratings mandated that the appointing authority either demote or dismiss the complainant pursuant to Board Rule 8-2-5(A), 4 Code Colo. Reg. 801-1, which provides:

An evaluation of overall unacceptable or needs improvement performance shall include a formal performance plan or a corrective action. A performance improvement plan is not a corrective action. The employee shall be afforded a reasonable period of time to improve performance. If when reevaluated under a

corrective action, the employee's evaluation is still needs improvement or unacceptable, such an evaluation is the basis for disciplinary action. Following a R8-3-3 meeting to consider disciplinary action based on this evaluation, absent extraordinary circumstances, the employee shall be dismissed, or at the discretion of the appointing authority, demoted if the employee has demonstrated competence at a lower level.

The renewed motion for summary judgment was denied. Respondent must prove just cause for the discipline imposed. Complainant is entitled to an evidentiary hearing on the factual basis underlying the discipline. Complainant's choice to not grieve the corrective actions or PACE ratings is not dispositive of the alleged facts demonstrating poor performance, which complainant disputes, when they culminate in discipline.

Following the mid-morning recess on the first day of hearing, August 10, the parties announced that a settlement agreement had been reached and jointly requested that the hearing be continued so the agreement could be finalized and drafted. The hearing was set to reconvene on September 22 in the event that the agreement fell through, which it did.

STIPULATIONS OF FACT1

The parties stipulated to the facts as admitted by complainant in answer to respondent's request for admissions. (Exhibits 12 and 13.) Stipulated facts are conclusive upon the parties and the tribunal. *Faught v. State*, 319 N.E.2d 843, 846-47 (Ind. App. 1974).

- 1. Gene Atherton was the appointing authority for purposes of this action.
- 2. Complainant received a corrective action dated October 13, 1995.
- 3. The October 13, 1995 corrective action was not rescinded or overturned through the grievance process.
- 4. Complainant received a corrective action dated October 2, 1996.
- 5. The October 2, 1996 corrective action was not rescinded or overturned through the grievance process.
- 6. Complainant received a corrective action dated April 16, 1997.
- 7. The April 16, 1997 corrective action was not rescinded or overturned through the grievance process.
- 8. Complainant received a corrective action dated June 11, 1997.
- 9. The June 11, 1997 corrective action was not rescinded or overturned through the grievance process.
- 10. Complainant received a corrective action dated September 22, 1997.
- 11. The September 22, 1997 corrective action was not rescinded or overturned through the grievance process.
- 12. Complainant received a June 11, 1997 needs improvement

performance rating.

- 13. The June 11, 1997 needs improvement performance rating was not rescinded, changed or overturned through the grievance process.
- 14. Complainant received an August 26, 1997 needs improvement performance rating.
- 15. The August 26, 1997 needs improvement performance rating was not rescinded, changed or overturned through the grievance process.

FINDINGS OF FACT

- 1. Complainant Robert Workman has been an employee of respondent Department of Corrections (DOC) for fourteen years. He served as a Case Manager I at the Delta Correctional Facility from 1990 until his disciplinary demotion to Correctional/Security Services Officer II effective February 1, 1998.
- 2. The duties of a Case Manager encompass serving as the direct link between inmates and DOC, evaluating the progress of inmates, making community referrals, reevaluating the security level of inmates, making recommendations to courts, developing parole plans and the like. Each case manager has a caseload of about 75 inmates, though the number may go as high as 90.
- 3. In October 1996 Workman returned to work following a proceeding in which he had been dismissed by the agency and reinstated by the Board with the direction that he receive a corrective action, which was in effect from October 1 through November 15, 1996. (Exhibit 3.)

- 4. Workman's overall performance evaluation of the period October 1 through November 15 was good. (Exhibit B.)
- 5. He was evaluated during the ensuing three-month period and was rated as good. (Exhibit C.)
- 6. On April 16, 1997, Workman was issued a corrective action aimed at improving the quality of his work as a result of specific occurrences demonstrating work deficiencies. (Exhibit 4.)
- 7. Workman received a performance rating of needs improvement for the period October 1, 1996 through June 11, 1997 based upon repeated deficiencies in case organization and keeping track of important documents, submitting inmate evaluations and other documents past due dates, and failing to make the appropriate entries in inmate records. (Exhibit 5.) A corrective action plan was instituted to improve the quantity and quality of his work. (Exhibit 6.)
- 8. On August 26, 1997, Workman received a needs improvement rating for the period June through August based upon overdue documents, lateness of inmate performance summaries and security reevaluations, failure to make required record entries and overall inferior quality of work. There was an increasing number of complaints by inmates alleging that Workman was not getting necessary things done on time. Not all of the complaints had merit, and there are inmate complaints against every case manager, but the number of complaints against Workman far outdistanced the number of complaints filed against any of the four other case managers. (Exhibit 7.)
- 9. On September 22, 1997, Workman was issued a corrective action

to correct performance deficiencies, noted by his failure to meet reporting requirements with respect to two specific inmates. (Exhibit 8.)

- 10. Gene Atherton, Superintendent of the Buena Vista Correctional Facility, was appointed by Delta Correctional Center Superintendent Bob Hickox to be the appointing authority for disciplinary action concerning complainant.
- 11. A Rule R8-3-3 meeting, lasting three hours, was held at the Delta facility on January 22, 1998. Atherton was especially attentive to any "extraordinary circumstances" which might preclude the operation of Rule R8-2-5(A) mandating either the demotion or termination of an employee who receives two consecutive needs improvement performance evaluation ratings.
- 12. Atherton did not find extraordinary circumstances that would prevent the application of R8-2-5(A). However, in review of complainant's personnel file, and taking into account all of the circumstances, the appointing authority found that Workman had demonstrated competence at a lower level.
- 13. By letter dated January 26, 1998, the appointing authority demoted the complainant to the position of Correctional/Security Services Officer II pursuant to R8-2-5(A). (Exhibit 11.)
- 14. Complainant filed a timely appeal of the disciplinary action on February 2, 1998.

DISCUSSION

In this de novo disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions

on which the discipline was based occurred and that just cause warrants the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. § 24-50-105(6), C.R.S.

Complainant was demoted pursuant to Rule 8-2-5(A), 4 Code Colo. Reg. 801-1, which provides that an employee with two consecutive needs improvement performance ratings shall be dismissed or demoted unless there are "extraordinary circumstances." Complainant's immediate supervisor testified openly, straightforwardly and credibly to the reasons underlying complainant's corrective actions and needs improvement performance appraisal ratings. The appointing authority approached the matter with an inquisitive mind and acted rationally in concluding that a disciplinary demotion was the appropriate sanction under the circumstances.

Complainant submits that it runs counter to the state personnel system to mandate that the agency either demote or dismiss an employee under certain circumstances. He contends that the appointing authority, who should have complete discretion in determining a sanction, felt constrained in this case to dismiss or demote and did not reasonably consider other alternatives, as required by the personnel rules.

It is a dubious proposition to argue, as complainant does, that the State Personnel Board does not have the authority "to tell an appointing authority what he can or can't do." There are a number of rules and policies that tell an appointing authority "what he can or can't do" with respect to disciplining employees. See, e.g., Rule 8-3-1, Rule 8-3-3(A) and Policy 8-3-(A), 4 Code Colo.

In any event, an appointing authority possesses Req. 801-1. discretion under Rule 8-2-5(A) to find "extraordinary circumstances" that would preclude the operation of the rule. An extraordinary circumstance might be the illness of the employee, or the appointing authority's need to comply with the principles of progressive discipline, or any other legitimate reason that would explain or justify the employee's poor performance. None was found by the appointing authority, and no persuasive evidence of circumstances was extraordinary presented at hearing. Complainant's contention that an extraordinary circumstance would be that neither demotion nor dismissal was warranted is not persuasive because the found and stipulated facts suggest otherwise with respect to this complainant.

Moreover, without the application of Rule 8-2-5(A), there is sufficient evidence to sustain a disciplinary demotion. Disciplinary demotion is a discipline within the realm of alternatives available to the appointing authority, who acted as a reasonable and prudent administrator in arriving at his decision.

This is not a proper case for the award of fees and costs under \S 24-50-125.5 of the State Personnel System Act.

CONCLUSIONS OF LAW

- 1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
- 2. The discipline imposed was within the range of available alternatives.
- 3. Just cause exists for the discipline imposed.

4. Neither party is entitled to an award of attorney fees.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day of
October, 1998, at
Robert W. Thompson, Jr.
Denver, Colorado.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R10-10-1 et seq., 4 Code Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. <u>Vendetti v. University of Southern Colorado</u>, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record must make arrangements with a disinterested recognized transcriber to prepare the transcript. The party should advise the transcriber to contact the Board office to obtain the hearing tapes. In order to be certified as part of the record on appeal the original transcript must be submitted to the Board within 45 days of the date of the notice of appeal is filed. It is the responsibility of the party requesting a transcript to ensure that any transcript is timely filed. If you have any questions or desire any further information contact the State Personnel Board office at (303) 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 Code Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline,

described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of October, 1998, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf Attorney at Law 1390 Logan Street, Suite 402 Denver, CO 80203

and in the interagency mail, addressed as follows:

Thomas S. Parchman
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203